IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

PETN,UNDER ARBITRATION ACT. No 30 of 2003

For Approval and Signature:

HON'BLE MR.JUSTICE D.K.TRIVEDI

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

GUJARAT ADANI PORT LTD.

Versus

VAN OORD ACZ INDIA PVT. LTD.

Appearance:

1. PETN,UNDER ARBITRATION ACT. No. 30 of 2003

Mr.S.B.Vakil, Senior Advocate, with Mr. Rakesh Gupta and Mr. Kartik Thakkar for M/S TRIVEDI & GUPTA for Petitioner

Mr.T.S. Murthy with and Mr.Jayesh L. Odedra, advocates of M/s.Amarchand and Mangaldas & Suresh A.Shroff & Co. the Advocates on Record, for Respondent.

CORAM : HON'BLE MR.JUSTICE D.K.TRIVEDI

Date of decision: 06/07/2004

CAV JUDGEMENT

1. The petitioner Company incorporated under the Companies Act, 1956, engaged in the business of rendering various types of port services including the work related to dredging and reclamation works in relation to construction of container / bulk terminal at Port Mundra within the jurisdiction of Gujarat State, has moved this court for appointment of arbitrator under Section 11 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "the Act" for short). In the application, the petitioner has prayed for appointment of Hon'ble Justice G.T. Nanavati (Retired Judge of the Supreme Court) as an Empire or any other Empire or any other name as may be suggested by the leave of this Court by the Advocates of the petitioner at the time of hearing. Other reliefs have also been sought for in the petition by praying the direction to proceed and determine the dispute and/or differences between the parties as early as possible. This petition is supported with an affidavit of Dr. M.K. Upadhyay, Deputy G.M. (Legal) of the petitioner Company dated 9th May, 2003. The petitioner has while filing this petition, annexed various documents including the contract dated 19th March, 2001, the Tripartite Agreement dated 18th July, 2001 and the correspondence between the parties including the legal notice issued by the petitioner to the respondent.

2. As found from the record that this petition was placed for consideration before the Judge Nominated by the learned Chief Justice to consider the application under the Act and notice was issued to the respondent as per order dated 20th June, 2003 and the same was made returnable on 18th July, 2003 subject to payment of Rs.1000=00 with the Registry of this court. It is further found that this petition was placed before the learned Nominated Judge by the learned Chief Justice from time to time after the service was served on the respondent and considering the joint request made by the counsel appearing in the matter, the matter was adjourned from time to time.

3. It is further found from the record that during pendency of this petition, an application being Civil Application No. 160 of 2003 was filed, in which the applicant Company has prayed for certain directions namely that respondent Company be directed to state on affidavit the exact / total number of employees in their employment during the years between 1999-2000, 2000-2001, 2001-2002 and 2002-2003 and also sought for reliefs that

the respondent Company be directed to confirm by affidavit that the details mentioned in the statement contained in the 5th Annual Report for the year ended on 31st March, 2002 being the statement under Section 217 (2A) of the Companies Act are correct. In the said application, the applicant Company has also prayed for seeking direction that the respondent Company be directed to furnish to the applicant, or produce on record the details and documents asked for by the applicant by Advocate's letter dated 14.8.2003. The said application was also supported with an affidavit of Shri M.K. Upadhyay, Deputy General Manager (Legal) dated 19th September, 2003, in which, the applicant had also produced certain documents, including the letter issued by the advocate for the applicant Company dated 17th September, 2003 addressed to Solicitors of the respondent Company and the copy of 5th Annual Report for the year ended on 31.3.2002 signed by the Directors of the respondent Company and other documents.

4. It is further found from the record of the said application that an affidavit-in-reply is filed by Shri Srivastava, the Director of the respondent Company dated 26th September, 2003 by highlighting that as per the agreement between the parties in the present case, the arbitration is an International Commercial Arbitration and the application filed before the Designate of the Hon'ble High Court of Gujarat has no jurisdiction to hear the application for arbitrator and in respect of the notice issued through advocate by the applicant Company, calling upon the respondent Company for supply of various details, the respondent Company had through Companies advocate gave reply on 21st August, 2003 and furnished required documents to the applicant Company and as against, it is the case of the applicant that though they have received certain documents, according to the applicant Company, the said statement does not appear to be exhaustive and seems to be containing details of only those employees in respect of whom details are required to be mentioned under the provisions of Section 217 (2A) of the Companies Act, 1956 and that there may be other employees in the employment of the respondent Company during the said period in addition to 51 employees whose details are mentioned in the said statement and accordingly, it is the case of the applicant that necessary directions be given to the respondent Company in respect of the request made in the application. It is also the case of the applicant Company that under letter dated 14.8.2004, when the applicant Company had asked the respondent Company to furnish details / documents, the respondent Company has not furnished the same to the

applicant and those documents are very vital and relevant to the question whether central management and control of the respondent Company is within India or outside India and the information, which the applicant has sought for are within exclusive knowledge of the respondent and that grave prejudice would be caused to the applicant in effectively dealing with the contentions raised by the respondent Company, if those documents are not ordered to be produced on record and accordingly, the applicant has prayed that the respondent be directed to produce these records in the present proceedings.

5. I have also examined the contentions raised in the application and the order passed by the Hon'ble Court (Coram : J.M. Panchal, J.) while deciding the said application on 15th December, 2003 and as per reasoned order, the application filed by the applicant Company was allowed and the respondent Company was directed to state on affidavit the exact / total number of employees in its employment during the years 1999-2000, 2000-2001, 2001-2002 and 2002-2003 and also to confirm by an affidavit that the details mentioned in the statement contained in 5th Annual Report for the year which ended on March 31, 2002, are correct and the respondent Company is further directed either to furnish to the applicant the details and documents except certificate of incorporation, asked for by the advocate of the applicant vide letter dated August 14, 2003, or to produce the same on the record of this forum and three weeks time was granted to the respondent Company for compliance of the said order and the application was accordingly allowed with no costs.

6. As found from the record that after disposal of the said application being O.J. Civil Application No. 160 of 2003, in compliance to the said order, an affidavit is filed by Shri A.P. Srivastava, Director of the respondent Company dated 12.1.2004 and he has annexed certain documents and accordingly, it is the case of the respondent Company that in compliance of the order dated 15.12.2003, the documents were produced. As found from the affidavit of Shri A.P. Srivastava dated 26.12.2003, he has also annexed the order passed by the Hon'ble Designated Judge of the Supreme Court. It is the case of the respondent Company that respondent Company had filed an application before the Apex Court for appointment of arbitrator under Section 11(6) of the Act, in first in point of time, while the present application filed by the petitioner Company, is filed after the application is filed by the respondent Company at a later stage and it is the case of the respondent Company that by this way,

petitioner Company is adopting delaying tactics.

7. Before the order was passed by Brother Justice J.M. Panchal while deciding the application being O.J. Civil Application No. 160 of 2003, learned Chief Justice has as per Notification dated 4th December, 2003, nominated me to deal with the matters as per the Arbitration Scheme framed under the Arbitration and Conciliation Ordinance, 1996 with effect from 5th December, 2003 and accordingly, thereafter, the matter pertaining to Arbitration and Conciliation Act as per the Scheme were placed for my consideration for admission and final hearing. The Arbitration matters are notified for admission and final hearing once in a week i.e. on every Friday, thereto in the second sitting and after I was nominated by learned Chief Justice, arbitration matters were placed before me for admission as well as for final hearing. Considering the request made before me by the counsel appearing in the matter and for their convenience, I have heard the matter and after conclusion of the arguments, the order was kept reserved. Thereafter, as per the roster, I was to proceed over the Division Bench, in which, Criminal Appeal were notified for admission and final hearing. As agreed by the counsel that they will furnish the note of arguments by way of submission, time was granted and accordingly, the written submissions were filed on behalf of the parties. While taking up criminal matters, one Confirmation Case with conviction appeal were notified for orders and Court has to give priority while deciding the Confirmation Case and appeal filed by the accused and accordingly, necessary directions were given to the jail authority for production of the accused and said Confirmation Case with appeal were heard and the same were disposed off. Thereafter, group of appeals filed by the accused challenging the order of conviction and sentence under N.D.P.S. Act were notified before us including the acquittal appeal filed by the original complainant. Said group of matters were notified before us and as joint request was made by the counsel appearing in the matter and learned Addl. P.P. and the advocate for the complainant that these appeals require priority, as some of the accused persons were in jail for about more than 11 years and sentence imposed to some of the appellants were to over within short period as the accused persons are in jail for about 11 years, where the sentence was imposed for 12 years and fine. These group of appeals were having bulky record of papers books consisting of about more than 6000 pages and accordingly, we had also given priority to those appeals and heard the said appeals and hearing of the appeals is concluded recently

and because of this fact, I could not spare time to pronounce the judgement in the present case and I express my apology for delay in pronouncing the order, in view of the order passed by the Hon'ble Designate Judge of the Apex Court in a pending application filed by the respondent Company.

8. I have heard Mr. S.B. Vakil, learned Senior Counsel, who appeared for the petitioner Company and Mr. Murthy, learned advocate for the respondent Company, who in term has taken me through the petition and documents attached thereto and the reply affidavit filed on behalf of the respondent Company. During hearing, the counsel appearing in the matter have also furnished certain orders passed by the Designated Judge of the Apex Court in a matter filed by the respondent Company being Arbitration Petition No. 15 of 2003, in which, the respondent Company had moved the Hon'ble Chief Justice of India for appointment of arbitrator filed under Sub-section (6) of Section 11 of the Act and as per order passed by the Hon'ble Designated Judge of the Apex Court on 6.1.2004, while adjourning the said petition on 15th March, 2004, the Hon'ble Judge has expressed that by that time, the petition pending before the High Court shall be disposed off. Accordingly, for the reasons given earlier for not disposing / pronouncing the order, I once again tender my sincere apology for not disposing the present petition.

9. I am conscious that the respondent Company had moved the Apex Court for seeking appointment of arbitrator as contemplated under Sub-section (6) of Section 11 of the Act and present application is filed by the petitioner Company thereafter, in which the petitioner has requested for appointment of 3rd arbitrator namely Empire, as the two arbitrators are already appointed from each side and they have to appoint the Empire for which, the petitioner Company has prayed for appointment of Hon'ble Justice G.T. Nanavati (Retired Judge of the Apex Court). While, it is the case of the respondent Company that respondent Company is the Company, whose central management and control is being exercised in Netherlands i.e. in the country other then this country and as third arbitrator, in an International Commercial Arbitration, is required to be appointed by the Hon'ble Chief Justice of India or the person or the institution designated by him, who has power to make appointment of 3rd arbitrator of a country other then the nationality of the parties, as the parties are belonging to different Nationality and while filing the application before the Apex Court, they have prayed to appoint 3rd

Arbitrator of a Nationality other then the nationality of the parties.

10. After the judgement of the Apex Court, while deciding the application for appointment of arbitrator, I am not require to deal with the merits of the case and as per the decision of the Apex Court, even the contention about jurisdiction of the Arbitrator also can be raised before the arbitrator and arbitrator has to decide, if such contention is raised and accordingly, I had restricted the hearing of this petition, in light of said decision and to consider for appointment of 3rd arbitrator as prayed for in this petition. I will make it clear that, keeping in mind the decision of the Apex Court, which I will refer later on, I am not examining the merits of the case put forward by the parties as well as the contentions raised before me during hearing.

11. As found from the application, the petitioner Company is a Company engaged in the business of rendering various types of port services including the work relating to dredging and reclamation work in relation to construction of containers / bulk terminals at Port Mundra within the jurisdiction of State of Gujarat. I was taken through the contract dated 19th March, 2001 and Tripartite agreement between the parties dated 18th July, 2001. The respondent is an Indian Company incorporated and registered under the provisions of the Companies Act, 1956. The respondent is claiming that their Company is a wholly owned subsidiary of M/s. Van Oord ACZ B.V. (now known as M/s. Van Oord ACZ Marine Contractors B.V.) having office at Nether lands ["Van Netherlands" for short]. The registered office of the respondent is located at Flat No. 204, 2nd Floor, Arunachal Building, Barakhamba Road, New Delhi - 110 001. The contract dated 19th March, 2001 was entered into between the petitioner and Van Netherlands and as per said contract, the work of dredging and reclamation in relation to construction of containers / bulk terminals at Port Mundra, Gujarat State was awarded by Van Netherlands to assign the whole of the contract to such an assignment and accordingly, the assignment agreement dated 18th July, 2001 being tripartite agreement between the petitioner, Van Netherlands and the respondent, was executed. In view of the tripartite agreement arrived at between the parties, the rights and responsibility under the old contract were duly assigned to the respondent Co. as per assignment agreement dated 18th July, 2001 and during the execution of the said work, disputes arisen between the petitioner and the respondent, which is highlighted in the Arbitration Petition.

12. In the contract Agreement, as per Clause 20.2, which clause pertains to Appointment of the Dispute Adjudication Board, which read as under :-

Clause 20.2 :- Appointment of the Dispute Adjudication Board :-

"Disputes shall be adjudicated by a DAB in accordance with Sub-Clause 20.4 [Obtaining Dispute Adjudication Board's Decision]. The Parties shall jointly appoint a DAB by the date 28 days after a Party gives notice to the other Party of its intention to refer a dispute to a DAB in accordance with Sub-Cluase 20.4.

The DAB shall comprise, as stated in the Particular Conditions, either one or three suitably qualified persons ('the members'). If the number is not so stated and the Parties do not agree otherwise, the DAB shall comprise three persons.

If the DAB is to comprise three persons, each Party shall nominate one member for the approval of the other Party. The Parties shall consult both these members and shall agree upon the third member, who shall be appointed to act as Chairman. However, if a list of potential members is included in the Contract, the members shall be selected from those on the list, other than anyone, who is unable or unwilling to accept appointment to the DAB.

The agreement between the Parties and either the sole member ('adjudicator') or each of the three members shall incorporate by reference the General Conditions of Dispute Adjudication Agreement contained in the Appendix to these General Conditions, with such amendments as are agreed between them.

The terms of the remuneration of either the sole member or each of the three members shall be mutually agreed upon by the Parties when agreeing the terms of appointment. Each Party shall be responsible for paying one half of this remuneration.

If at any time the Parties so agree, they may appoint a suitably qualified person or persons to replace any one or more members of the DAB. Unless the Parties agree otherwise, the appointment will come into effect if a member declines to act or is unable to act as a result of death, disability, resignation or termination of appointment. The replacement shall be

appointed in the same manner as the replaced person was required to have been nominated or agreed upon as described in this Sub-Clause.

The appointment of any member may be terminated by mutual agreement of both Parties, but not by the Employer or the Contractor acting alone. Unless otherwise agreed by both parties, the appointment of the DAB (including each member) shall expire when the DAB has given its decision on the dispute referred to it under Sub Clause 20.4, unless other disputes have been referred to the DAB by that time under Sub-Clause 20.4, in which event the relevant date shall be when the DAB has also given decisions on those disputes."

In view of Clause 20.2 of the Contract, the dispute between the parties is to be resolved by a Dispute Adjudication Board and Board is comprising three persons and each party is entitled to Nominate one member in the said Board. As found from the order passed by brother Justice J.M.Panchal while disposing of Civil Application No. 160 of 2003 that the respondent Company has as per advocate's notice dated 14th January, 2003 has nominated Hon'ble Mr. Justice J.K. Mehra (retired) as its nominee on the Dispute Adjudication Board, whereas, the petitioner Company has under its letter dated 27th January, 2003 nominated Hon'ble Mr. Justice N.J. Pandya (retired) as its nominee. The two appointed Arbitrators have not been able to reach an agreement regarding appointment of third arbitrator, who is designated as Chairman under the Contract. In view of this back ground, the respondent Company has filed petition before the Supreme Court of India as provided under Section 11 (10) of the Act, as it is the case of the respondent Company that their Company's central management and control is exercised in Netherlands i.e. in a country other than India, and as third arbitrator in an International Commercial Arbitration is required to be appointed, Hon'ble the Chief Justice of India or the person or the institution designated by him, has power to make appointment of third arbitrator of a nationality other than the nationalities of the parties, as the parties belong to different nationalities. In the petition filed by the respondent Company, the Designated Judge of the Supreme Court has issued notice to the parties for appointment of Presiding Arbitrator and before the returnable date of the said notice, the petitioner Company has approached this Court for appointment of arbitrator and suggests the name of Hon'ble Mr. Justice G.T. Nanavati (Former Judge, Supreme Court of India) as Empire. It is the contention

of the petitioner Company that it is not an International Commercial Arbitration as contended by respondent Company before the Supreme Court and petition which is filed by the respondent Company, has no jurisdiction to entertain such petition.

13. Mr. Vakil, learned Senior Advocate has vehemently urged that when the petitioner has approached this court for appointment of an Arbitrator to resolve the dispute between the parties and the respondent Company has appointed Justice Mehra (Retired) as their Arbitrator on 14.1.2003 and the petitioner has appointed Justice N.J.Pandya (Retired) as his Arbitrator on 27.1.2003 and these two Arbitrators did not appoint the third Arbitrator, accordingly, the petitioner has approached this Court by filing this petition and before approaching this Court, the respondent Company has approached the Chief Justice of India by filing petition as contemplated under Section 11 (7) read with Sub-section 12 (a) of Section 11 of the Act on the ground that allegation that the matter arose in the International Commercial Arbitration and the Hon'ble Designated Judge of the Supreme Court had issued notice, which was made returnable on 15th July, 2003 as per order dated 15th May, 2003. In view of the present petition filed by the petitioner, the learned Nominee by the Chief Justice has issued notice to the respondent. Before the Supreme Court, a reply is filed on behalf of the petitioner Company contenting that petition filed by the respondent Company is not tenable, as the matter is not arise in the International Commercial Arbitration, while the respondent Company has in this proceeding, filed reply that the matter arose in the International Commercial Arbitration and Chief Justice of the High Court is not competent authority as provided under Subsection 7 of Section 11 of the Act and as per the provisions of Sub-section 12 (a) of Section 11, the application would lie before the Chief Justice of India. It is the contention of Mr. Vakil that while deciding such application, where the application is filed for seeking an appointment of an Arbitrator and for determination of such application, as contemplated under the Act, the Chief Justice or his Nominee is functioning as an Administrative Authority and any contention or plea raise by the respondent that the matter arose out of an International Commercial Arbitration, which contention has been denied by the petitioner, the Nominee is required to appoint third Arbitrator without entering into such contention and in support of his submission, he placed reliance upon the decision in the matter of Konkan Railway Corporation Limited Vs. Mehul Construction

Company, reported in 2000 (7) SCC p.2001.

14. Mr. Murthy, learned advocate appearing for the respondent Company placed reliance upon Sub-section 12 of Section 11 of the Arbitration and Conciliation Act, 1996 and submits that in an International Commercial Arbitration, the power to appoint the Presiding Arbitrator is solely vests with the Hon'ble Chief Justice of India and he placed reliance upon the Arbitration clause arrived at between the parties, which reads as under :-

"Unless settled amicably, any dispute in respect of which the DAB's decision (if any) has not become final and binding shall be finally settled by international arbitration. Unless otherwise agreed by both parties :

a) There shall be three arbitrators.
b) The language to be used in the arbitration shall be English.
c) The place of arbitration shall be Ahmedabad with jurisdiction restricted to the Gujarat High Court.
d) The arbitration shall be carried out in accordance with the laws of India.

The arbitrator(s) shall have full power to open up, review and revise any certificate, determination, instruction, opinion or valuation of (or on behalf of) the Employer, and any decision of the DAB, relevant to the dispute.

Neither Party shall be limited in the proceedings before the arbitrator(s) to the evidence or arguments previously put before the DAB to obtain its decision, or to the reasons for dissatisfaction given in its notice of dissatisfaction. Any decision of the DAB shall be admissible in evidence in the arbitration.

Arbitration may be commenced prior to or after completion of the Works. The obligations of the Parties and the DAB shall not be altered by reason of any arbitration being conducted during the progress of the Works.

Any dispute in respect of which amicable settlement has not been reached within the period stated in accordance with the Arbitration and Conciliation Act, 1996 and by other enactments or

modification thereto which shall be deemed to be incorporated herein by reference to this sub clause".

In view of the Arbitration Clause, it is the contention of Mr. Murthy that the respondent Company has already approached the Apex Court for seeking relief of appointment of arbitrator under the provisions of the Act and the said petition was filed earlier in point of time, while the petitioner had approached this court by relying upon the agreement of the contract for appointment of arbitrator subsequently and in view of the said fact and in view of the contentions raised by the respondent, the Apex Court has jurisdiction to make appointment of arbitrator and has placed reliance upon Subsection 4, 5 and 6 of Section 11 of the Arbitration and Conciliation Act. Mr. Murthy has accordingly contended that when the respondent Company had while filing petition under Subsection 12 of Section 11 of the Act has already moved the Apex Court prior to the filing of the petition before this court by relying upon the agreement / contract for appointment of presiding arbitrator and the matter is pending before the Apex Court and accordingly, the present petition filed before this court, where this court has no jurisdiction to appoint arbitrator as prayed for by the petitioner Company, relying upon the provisions of Subsection 4, 5 and 6 and Subsection 12 of Section 11 and according to him, when the respondent Company has already approached the Hon'ble Apex Court for seeking relief of appointment of arbitrator and when such petition is pending for determination, petition filed by the petitioner deserves to be dismissed only on this ground. Mr. Murthy has also on the point of jurisdiction contented before me that every application, which is filed before the High Court under Section 11 of the Act, does not necessarily to be entertained for appointment of arbitrator and while deciding such petition, the delegate appointed by the learned Chief Justice has to consider the condition precedent and to examine whether he has jurisdiction to entertain the petition and according to him that the petition filed by the petitioner Company and in view of agreement arrived at between the parties is being an international commercial arbitration and for appointment of such arbitrator, if any dispute is arose, such appointment is to be made by the Hon'ble Chief Justice of India or Hon'ble Delegate appointed by him and in the present case that the agreement arrived at between the parties, is not a domestic arbitration and the same is international commercial arbitration and in view of said fact, the application deserves to be dismissed. Mr. Murthy has

also placed reliance upon the decision of the Apex Court in the matter of FOOD CORPORATION OF INDIA vs. INDIAN COUNCIL OF ARBITRATION AND OTHERS, reported in (2003) 5 Scale p. 276 and decision in the matter of HYDRO POWER CORPORATION LTD VS. DELHI TRANSCO LTD, reported in (2003) 5 Scale p.590 and contended that in the said matter, the Apex Court was not to consider with regard to the issue of lack of jurisdiction and accordingly, the Apex Court has not examined the question with regard to exercise of powers under Section 11 of the Act and accordingly, he vehemently urged that the petition filed for appointment of arbitration deserves to be dismissed.

15. In light of the submissions made before me and as found from the record of the case, it is not in dispute that the respondent Company has already approached the Apex Court as per Subsection 12 of Section 11 of the Arbitration and Conciliation Act, 1996 for appointment of arbitrator and the dispute between the parties were not settled amicably. Even as per agreement, the parties had agreed that place of arbitration would be at Ahmedabad, which is within the jurisdiction of High Court of Gujarat and further that parties have also agreed, as per Clause "D" that the arbitration shall be carried out in accordance with law of India.

16. When the petitioner has approached by filing petition before this court, the learned Chief Justice had appointed nominee to decide such application and while deciding such application, the learned Chief Justice or his nominee is while deciding such application as an Administrative authority and nominee has to appoint 3rd Arbitrator without entering about the contention that the dispute between the parties arises out of an International Commercial Arbitration and in light of the decision in the matter of KONKAN RAILWAY CORPORATION VS. MEHUL CONSTRUCTION COMPANY, reported in 2000 (7) p.2821. In the said decision, the Supreme Court has examined various aspects and Subsection 6 of Section 11 of the Arbitration and Conciliation Act. In para 4, the Apex Court has observed, which reads as under :-

"para 4.: At the outset, it must be borne in mind that prior to the 1996 Act, the Arbitration Act of 1940, which was in force in India provided for domestic arbitration and no provision was there to deal with the foreign awards. So far as the Foreign Awards are concerned, the same were being dealt with by the Arbitration (Protocol and Convention) Act, 1937, and the Foreign Awards (Recognition and Enforcement) Act, 1961. The

increasing growth of global trade and the delay in disposal of cases in Court under the normal system in several countries made it alternative Dispute Resolution System, more particularly, in the matter of commercial disputes. When the entire world was moving in favour of a speedy resolution of commercial disputes, the United Nations Commission on International Trade Law way back in 1985 adopted the Uncitral Model Law of International Commercial Arbitration and since then number of countries have given recognition to that Model in their respective legislative system. With the said Uncitral Model Law in view the present Arbitration and Conciliation Act of 1996 has been enacted in India replacing the Indian Arbitration Act, 1940, which was the principal legislation on Arbitration in the country that has been enacted during the British Rule. The Arbitration Act of 1996 provides not only for domestic arbitration but spreads its sweep to International Commercial Arbitration too. The Indian law relating to the enforcement of Foreign Arbitration Awards provides for greater automony in the arbitral process and limits judicial intervention to a narrower circumference than under the previous law. To attract the confidence of International Mercantile community and the growing volume of India's trade and commercial relationship with the rest of the world after the new liberalization policy of the Government, Indian Parliament was persuaded to enact the Arbitration and Conciliation Act of 1996 in Uncitral Model and, therefore, in interpreting any provisions of the 1996 Act, Courts must not ignore the objects and purpose of the enactment of 1996. A bare comparison of different provisions of the Arbitration Act of 1940 with the provisions of the Arbitration and Conciliation Act, 1996 would unequivocally indicate that 1996 Act limits intervention of Court with an arbitral process to the minimum and it is certainly not the legislative intent that each and every order passed by an authority under the Act would be a subject matter of judicial scrutiny of a Court of Law. Under the new law the grounds on which an award of an arbitrator could be challenged before the Court have been severely cut down and such challenge is now permitted on the basis of invalidity of the agreement, want of jurisdiction on the part of the arbitrator or want of proper

notice to a party of the appointment of the arbitrator or of arbitral proceedings. The powers of the arbitrator have been amplified by insertion of specific provisions of several matters. Obstructive tactics adopted by the parties in arbitration proceedings are sought to be thwarted by an express provision inasmuch as it a party knowingly keeps silent and then suddenly raises a procedural objection will not be allowed to do so. The role of institutions in promoting and organizing arbitration has been recognized. The power to nominate arbitrators has been given to the Chief Justice or to an institution or person designated by him. The time limit for making awards has been deleted. The existing provisions in 1940 Act relating to arbitration through intervention of Court, when there is no suit pending or by order of the Court when there is a suit pending, have been removed. The importance of transactional commercial arbitration has been recognized and it has been specifically provided that even where the arbitration is held in India, the parties to the contract would be free to designate the law applicable to the substance of the dispute. Under the new law unless the agreement provides otherwise, the arbitrators are required to give reasons for the award. The award itself has now been vested with status of a decree, inasmuch as the award itself is made executable as a decree and it will no longer be necessary to apply to the Court for a decree in terms of the award. All these aim at achieving the sole object to resolve the dispute as expeditiously as possible with the minimum intervention of a Court of Law so that the trade and commerce is not affected on account of litigations before a Court. When United Nations established the Commission on International Trade Law, it is on account of the fact that the General Assembly recognized that disparities in national laws governing international trade created obstacles to the flow of trade. The General Assembly regarded the Commission on International Trade Law as a medium which could play a more active role in reducing or removing the obstacles. Such Commission, therefore, was given a mandate for progressive harmonization and unification of the law of International Trade. With that objective when Uncitral Model has been prepared and the Parliament in our country enacted the Arbitration

and Conciliation Act of 1996 adopting Uncitral Model, it would be appropriate to bear the said objective in mind while interpreting any provision of the Act. The Statement of Objects and Reasons of the Act clearly enunciates that the main objective of the legislation was to minimize the supervisory role of Courts in the arbitral process. If a comparison is made between the language of Section 11 of the Act and Article 11 of the Model Law, it would be apparent that the Act has designated the Chief Justice of a High Court in cases of domestic arbitration and the Chief Justice of India in cases of international commercial arbitration, to be the authority to perform the function of appointment of arbitrator whereas under the Model Law the said power has been vested with the Courts. When the matter is placed before the Chief Justice or his nominee under Section 11 of the Act is imperative for the said Chief Justice or his nominee to bear in mind the legislative intent that the arbitral process should be set in motion without any delay whatsoever and all contentious issues are left to be raised before the arbitral tribunal itself. At that stage it would not be appropriate for the Chief Justice or his nominee to entertain any contentious issue between the parties and decide the same. A bare reading of Sections 15 and 16 of the Act makes it crystal clear that questions with regard to the qualifications, independence and impartiality of the arbitrator, and in respect of the jurisdiction of the arbitrator could be raised before the arbitrator who would decide the same. Section 13 (1) provides that party would be free to agree on a procedure for challenging an arbitrator. Sub-section (2) of said Section provides that failing any such agreement, a party intending to challenge an arbitrator, either on grounds of independence or impartiality or on the grounds of lack of requisite qualifications, shall within 15 days of becoming aware of the constitution of the Tribunal send a written statement for the challenge to the Tribunal itself. Section 13 (3) provides that unless the arbitrator withdraws or the other party agrees to the challenge, the Tribunal shall decide on the challenge itself. Sub-section (4) of Section 13 mandates an arbitrator to continue the arbitral proceedings and to make an award. Section 16 empowers the arbitral Tribunal to rule on its own

as well as on objections with respect to the existence or validity of the arbitration agreement. Conferment of such power on the arbitrator under 1996 Act indicates the intention of the legislature and its anxiety to see that the arbitral process is set in motion. This being the legislative intent, it would be proper for the Chief Justice or the Nominee just to appoint Arbitrator without wasting any time or without entertaining any contentious issues at that state, by a party objecting to the appointment of an Arbitrator. If this approach is adhered to, then there would be no grievance of any party and in the arbitral proceeding, it would be open to raise any objection, as provided under the Act. But certain contingencies may arise where the Chief Justice or his nominee refuses to make an appointment of an arbitrator and in such a case a party seeking appointment of arbitrator cannot be said to be without any remedy. Bearing in mind the purpose of legislation, the language used in Section 11 (6) conferring power on the Chief Justice or his nominee to appoint an arbitrator, the curtailment of the powers of the Court in the matter of interference, the expanding jurisdiction of the arbitrator in course of the arbitral proceedings, and above all the main objective, namely, the confidence of the international market for speedy disposal of their disputes, the character and status of an order appointing arbitrator by the Chief Justice or his nominee under Section 11 (6) has to be decided upon. If it is held that an order under Section 11 (6) is a judicial or quasi-judicial order then the said order would be amenable for judicial intervention and any reluctant party may frustrate the entire purpose of the Act by adopting dilatory tactics in approaching a Court of law even against an order of appointment of an arbitrator. Such an interpretation has to be avoided in order to achieve the basic objective for which the country has enacted the Act of 1996 adopting Uncitral Model. If on the other hand, it is held that the order passed by the Chief Justice under Section 11 (6) is administrative in nature, then in such event, in a case where the learned Chief Justice or his Nominee refuses erroneously to make an appointment then an intervention could be possible by a Court in the same way as an intervention is possible against an

administrative order of the executive. In other words, it would be a case of non-performance of the duty by the Chief Justice or his Nominee, and therefore, a mandamus would lie. If such an interpretation is given with regard to the character of the order that has been passed under Section 11 (6) then in the event an order of refusal is passed under Section 11(6), it would be remedies by issuance of a mandamus. We are persuaded to accept the second alternative inasmuch as in such an event there would not be inordinate delay in setting up the arbitral process in motion. But, as has been explained earlier in the earlier part of this judgement, the duty of the Chief Justice or his Nominee being to set the arbitral process in motion, it is expected that invariably the Chief Justice or his Nominee would make an appointment of Arbitrator so that the arbitral proceedings would start as expeditiously as possible and the dispute itself could be resolved and the objective of the Act can be achieved. In fact a Bench of this Court in Sundaram Finance (1999 AIR SCW 225 : AIR 1999 SC 565) (supra) while considering the scope of Section 9 of the Act has approached the problem from this perspective and incidental observation has been made that Section 11 does not require the Court to pass a judicial order appointing arbitrator. The nature and function performed by the Chief Justice or his nominee under Sub-section (6) of Section 11 being essentially to aid the constitution of the arbitral Tribunal cannot be held to be a judicial function as otherwise the legislature could have used the expression 'court' or 'judicial authority' instead of choosing the expression 'the Chief Justice or his nominee'. If a comparison is made with the English Arbitration Act 1996, it would appear that under the English Act it is the Court which has been vested with the function of appointment of an arbitrator upon failure of the agreed appointment procedure and an order made by the Court becomes appealable under Section 11 (5) whereas under the Arbitration and Conciliation Act of 1996 in India the power of appointment is vested with the Chief Justice or his nominee."

In another decision in case of GRID CORPORATION OF ORISSA LTD. VS. AES CORPORATION AND OTHERS, reported in 2003 Arb.W.L.J. 1 SC, p.1, wherein, the Supreme Court

in para 25 has observed, which read as under :-

"para 25: In Konkan Rly. Corp. Ltd. (supra), it has been held (vide para 21) that in spite of an appointment having been made by the Chief Justice or his designate, an objection as to the constitution of the Arbitral Tribunal being improper or without jurisdiction is capable of being raised before the Arbitral Tribunal itself under Section 16 of the Act, for an objection not only as to the width of jurisdiction but also one going to the very root of its jurisdiction is entertainable by the Arbitral Tribunal under Section 16. That being so, assuming without holding that there is any substance in the plea of the petitioners, it is open for them to raise the same before the Arbitral Tribunal. Once the Arbitral Tribunal has come into existence, as it has - in my opinion in the facts and circumstances of the case, a petition under Section 11 (6) of the Act is not an appropriate remedy which the petitioners have chosen. None of the grounds contemplated by clauses (a) (b) and (c) of sub-section (6) of Section 11 exists. There is no deficiency in the constitution of the Arbitral Tribunal attributable to any of the parties or the arbitrators. There is no occasion for filing a request petition under Section 11 (6) of the Act."

In another decision of the Apex Court in the matter of KONKAN RAILWAY CORPORATION LIMITED VS. RANI CONSTRUCTION COMPANY, reported in (2002) 2 SCC p.388, the Supreme Court has considered about the provisions of Section 11 of the Act and in para 18, the Supreme Court has observed, which reads as under :-

"para 18 : There is nothing in Section 11 that requires the party other than the party making the request to be noticed. It does not contemplate the response from other parties. It does not contemplate a decision by the Chief Justice or his Designate on any controversy that the other party may raise, even in regard to its failure to appoint an Arbitrator within the period of 30 days.That the Chief Justice or his designate has to make the nomination of an arbitrator only if the period of thirty days is over does not lead to the conclusion that the decision to nominate is adjudicatory. In its request to the Chief Justice to make the

appointment, the party would aver that this period has passed and, ordinarily, correspondence between the parties would be annexed to bear this out. This is all that the Chief Justice or his Designate has to say. That the Chief Justice or his Designate has to take into account the qualifications required of the Arbitrator by the agreement between the parties (which, ordinarily, would also be annexed to the request) and other considerations likely to secure the nomination of an independent and impartial arbitrator also cannot lead to a conclusion that the Chief Justice or his Designate is required to perform an adjudicatory function. That the word "decision" is used in the matter of the request by a party to nominate an arbitrator does not of itself mean that an adjudicatory decision is contemplated."

In another decision, the Apex court in the matter of FOOD CORPORATION OF INDIA VS. INDIAN COUNSEL OF ARBITRATION AND OTHERS, reported in 2003 (5) Scale p.276, in which the Supreme Court has in par 14 has observed, which reads as under :-

"para 14 : .....As indicated earlier, even assuming without accepting for purposes of consideration that there is infirmity in the arbitration clause which goes to undermine as claimed by the respondents the legality, propriety and validity of the constitution of the Tribunal and/or even if there by any objections as to the existence of an enforceable or valid arbitration agreement, it has to be adjudicated by the very Arbitral Tribunal after a reference is made to it on being so constituted and it is not for the ICA or the learned Judge in the High Court to undertake this impermissible adjudicatory task of adjudging highly contentious issues between the parties. As observed by the Constitution Bench of this Court, there is nothing in Section 11 of the 1996 Act that requires the party other than the party making the request to be noticed and that it neither does contemplate a response from the other party nor contemplates any decision by the Chief Justice or his nominee on any controversy that the other party may raise, even in regard to its failure to appoint an arbitrator within the stipulated period. The legislative intent under the 1996 Act is to minimize the supervisory roles

of Courts in the arbitral process and nominate / appoint the arbitrator without wasting time, leaving all contentious issues to be merged and agitated before the Arbitral Tribunal itself. Even under the old law, common sense approach alone was commended for being adopted in construing an arbitration clause more to perpetuate the intention of parties to get their disputes resolved through the alternate disputes redressal method of arbitration rather than thward it by adopting a narrow, pedantic and legalistic interpretation."

Another decision in the matter of HYDRO POWER CORPORATION LIMITED VS. DELHI TRANSCO LTD, reported in 2003 (5) Scale p.590, in which the Supreme Court has in par 11 observed, which reads as under :-

"para 11 : Keeping in view the law as settled by this Court, the designate of the Chief Justice acting under Section 11 of the Act and the Division Bench of the High Court in exercise of power under Article 226 of the Constitution both acted under a misconception of law and wrongly held that the disputes were not referably to the arbitration. The appellant sought reference of its disputes with the respondent/company for adjudication through the arbitration in accordance with arbitration clause in the alleged agreement arrived at between them. Whether on the facts mentioned above an arbitration agreement can be said to have existed by recourse to arbitration clause in NIT was itself a dispute which deserved to be referred to the Arbitral Tribunal in accordance with the arbitration clause. Section 17 empowers the Arbitral Tribunal to decide the question of existence and validity of the arbitration agreement."

17. In light of the decision of the Apex Court in Konkan Railway (Supra), while hearing of this petition, I had not permitted the counsel to address this court in respect of their contentions on merit as well as on the point of appointment of arbitrator as, as per the decision of the Apex Court, the parties can agitate before the Arbitral Tribunal on the contentions of jurisdiction as well as, before the Tribunal can examine the contention on merit, it will be open for the parties to agitate this contention before the Tribunal in respect of which the application is made.

18. On examining the record, when legal notice was issued by the respondent Company on 14.1.2003, in the said notice, the respondent Company has nominated Hon'ble Justice J.K. Mehra (Retired), as their nominee as an Arbitrator and the petitioner Company was called upon to nominate their nominee as an Arbitrator and accordingly, in response to the said notice, the petitioner Company has nominated Justice N.J. Pandya (Retired) as their nominee in Arbitral Tribunal and the petitioner Company has accordingly informed the name of their nominee to the respondent Company. It is further found from the record that as per amended para 5.1, the nominee of the petitioner Company Justice N.J. Pandya (Retired) has suggested the name of Hon'ble Mr. Justice G.T. Nanavati (Retired Judge of the Supreme Court) as an Empire / third arbitrator and the nominee appointed by the respondent Company Justice J.K. Mehra (Retired) has not declined to the suggestion of Justice N.J. Pandya (Retired).

19. As found from the written submission submitted on behalf of respondent Company, in respect of appointment of third arbitrator, it is their contention that the present arbitration is an International Commercial Arbitration and appointment of arbitrator would vest to the Chief Justice of India or his designate and the question, which I am require to examine is that whether the present arbitration is an International Commercial Arbitration or domestic arbitration and further without prejudice to the contentions, it is the case of the respondent Company that name of Hon'ble Justice G.T. Nanavati (Retired Judge of the Supreme Court) has not been forwarded to the parties by the arbitrator and the applicant Company should disclose their basis of their ex-parte information.

20. Considering the contract agreement on the record of the case, which I have already discussed earlier, even as per Clause (c) of the Agreement, the parties had agreed that place of arbitration shall be Ahmedabad with jurisdiction restricted to the Gujarat High Court and the arbitration shall be carried out in accordance with laws of India. It is admitted fact that the respondent Company has already prior to the filing of this application, had approached the Apex Court for seeking relief of appointment of third arbitrator and the said petition is pending and as per the order passed in the said proceedings, petition pending is ordered to be disposed off. It is the case of the petitioner that

nominee of the petitioner Company has suggested the name of Hon'ble Justice G.T. Nanavati (Retired Judge of the Supreme Court) as third arbitrator and as there was not reply from the respondent Company, the petitioner has approached this court by filing petition and even as per the agreement, the place of arbitration, as agreed between the parties, is at Ahmedabad with jurisdiction restricted to the Gujarat High Court. Even the contention which Mr. Murthy has raised, can also be agitated before the Tribunal in view of the decision of the Apex Court. Accordingly, I am of the view that the prayer made in this petition for appointment of Hon'ble Justice G.T. Nanavati (Retired Judge of the Supreme Court) as an Empire / third arbitrator deserves to be allowed. Accordingly, Hon'ble Mr. Justice G.T. Nanavati (Retired Judge of the Supreme Court) is appointed as third arbitrator (Empire). Rule is made absolute in above terms with no costs.

(D.K.Trivedi, J.)

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